Supreme Court, U.S.
FILED

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CASE NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1994

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THINGS REMEMBERED, INC.,

Petitioner

v.

ANTHONY A. PETRARCA,

Respondent

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Petition for Writ of Certiorari
to the United States Court of
Appeals for the Sixth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether an order of a District Court remanding a case to Bankruptcy Court on jurisdictional, not equitable, grounds is reviewable by the Court of Appeals under 28 U.S.C. § 1452(b).

**TABLE OF CONTENTS**


| | Page |
|---|---|
| QUESTION PRESENTED FOR REVIEW | i |
| TABLE OF AUTHORITIES | iii |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATUTES INVOLVED IN THE CASE | 3 |
| STATEMENT OF THE CASE | 6 |
| REASONS FOR GRANTING THE PETITION | 11 |
| APPEAL OF AN ORDER REMANDING A CASE REMOVED PURSUANT TO 28 U.S.C. § 1452 (a) IS NOT BARRED IF THE ORDER OF REMAND IS ON JURISDICTIONAL GROUNDS | 11 |
| A. There Is a Direct Conflict in the Circuits on This Important Issue | 11 |
| B. The Plain Language of the Statute Bars Appeals Only of Equitable Remands | 14 |
| C. The Cases Relied Upon by the CourtBelow Are Not in Accord With the Plain Language of the Statute | 16 |





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|---|---|
| D. Cardinal Canons of Statutory Construction Require that the Plain Language of the Statute be Given Effect; § 1447(d) Does Not Bar Appeal of Bankruptcy Remands | 23 |
| CONCLUSION | 28 |
| APPENDICES | 1a |
| APPENDIX A | 1a |
| APPENDIX B | 5a |
| APPENDIX C | 8a |
| APPENDIX D | 60a |

## TABLE OF AUTHORITIES

**CASES** **Page**

*Boone Coal and Timber Co.* v. Polan, 787 F.2d 1056 (6th Cir. 1986) . . . . . 20,21

*Browning v. Navarro,* 743 F.2d 1069 (5th Cir. 1984) . . . . . 17,20,21

*Connecticut National Bank v. Germain,* 112 S. Ct. 1146 (1992) . . . . . 13,24

*Hernandez v. Brakegate,* 942 F.2d 1223 (7th Cir. 1991) . . . . . 18,19,24

*In re Aztec Industries, Inc.,* 84 B.R. 464 (Bankr. N.D. Ohio 1987) . . . . . 16

*In re National Developers, Inc.,* 803 F.2d 616 (11th Cir. 1986) . . . . . 17

*Johnson v. Robison,* 415 U.S. 361 (1974) . . . . . 13

*Kungys v. United States,* 108 S. Ct. 1537 (1988) . . . . . 27

*Morissette v. United States,* 342 U.S. 246 (1952) . . . . . 25

*National City Bank v. Coopers and Lybrand,* 802 F.2d 990 (8th Cir. 1986) . . . . . 17



*Northern Pipeline Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982) . . . . . 26

*Pacor, Inc. v. Higgins,* 743 F.2d 984 (3d Cir. 1984) . . . . . *Passim*

*South Windsor Convalescent Home, Inc. v. Mathews,* 541 F.2d 910 (2d Cir. 1976) . . . . 13

*Sykes v. Texas Air Corp.,* 834 F.2d 488 (5th Cir. 1987) . . . . . 19,21,24

*Thomas Jefferson University v. Shalala,* 114 S. Ct. 2381 (1994) . . . . . 27

*United States v. Rice,* 327 U.S. 742 (1946) . . . . . 22,23

*United States v. Shabani,* 63 U.S.L.W. 4001 (1994) . . . . . 25

**STATUTES**

28 U.S.C. § 1254 . . . . . 2,6

28 U.S.C. § 1331 . . . . . 18

28 U.S.C. § 1334 . . . . . 2,15

28 U.S.C. §§ 1441-1447 . . . . . 26

28 U.S.C. §§ 1447 . . . . . 17

28 U.S.C. § 1441 . . . . . *Passim*

28 U.S.C. § 1452 . . . . . *Passim*

28 U.S.C. 1471 . . . . . 16

28 U.S.C. 1478 . . . . . 16,17,26

Act of 1887 . . . . . 23



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

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THINGS REMEMBERED, INC.,

*Petitioner,*

v.

ANTHONY A. PETRARCA,

*Respondent.*

---

**Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

---

## PETITION FOR WRIT OF CERTIORARI

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Things Remembered, Inc. ("TRI") petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Sixth Circuit.[1]

## OPINIONS BELOW

The order of the court of appeals dismissing the action for lack of jurisdiction is unreported but is reprinted in the appendix hereto ("App")

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[1] In accordance with Rule 29.1., Cole National Group, Inc. is the parent company of TRI. Cole Management Services, Inc. is the only subsidiary of TRI.

at 1a. The order of the court of appeals denying petitioner's petition for rehearing appears at App. 5a. The June 25, 1993, opinion of the bankruptcy court granting petitioner's motion to transfer venue is reprinted at App. 8a. The accompanying order is reprinted at App. 27a. The order of the district court reversing the bankruptcy court's June 25, 1993, order is reprinted at App. 31a.

## JURISDICTION

The jurisdiction of the Court is timely invoked under 28 U.S.C. § 1254(1). The Sixth Circuit entered its Order dismissing the case for lack of jurisdiction on November 15, 1994. The Sixth Circuit denied of petitioner's petition for rehearing on January 12, 1995.

## STATUTES INVOLVED IN THE CASE

28 U.S.C. § 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or



arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the Court of Appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a

case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

28 U.S.C. § 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed



with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

28 U.S.C. § 1452. Removal of claims related to bankruptcy cases

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the Court of Appeals under

section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

**STATEMENT OF THE CASE**

In March, 1992, Anthony A. Petrarca ("Petrarca") sued Child World, Inc. ("Child World") and Cole National Corporation[2] in an Ohio state court. In the complaint, Petrarca alleged that Child World had breached leases for certain real property in Denver, Colorado, and Wichita, Kansas, and that Things Remembered, Inc. had breached a limited, conditional guaranty of the Denver lease only. The damages alleged as against TRI only (that is, the damages relating to the Denver guaranty)

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[2] TRI is successor in interest by merger to Cole National Corporation. For ease of reference, and because any liabilities of Cole National Corporation in this litigation are those of TRI, both will be referred to interchangeably hereafter as "TRI."



totalled approximately $2.8 million.

In May, 1992, Child World filed a petition under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. Thereafter, as part of its bankruptcy proceedings, Child World rejected the leases specified in Petrarca's state court complaint.

On August 28, 1992, Petrarca filed an amended complaint in state court. The amended complaint added ten new counts. In those new counts, Petrarca alleged new claims relating to different guaranties of different properties in Ft. Wayne, Indiana; Lancaster, Pennsylvania; Akron, Ohio; Westland, Michigan; and Peoria, Illinois. In addition, the amended complaint added new damage claims totalling

approximately $12.3 million.

On September 25, 1992 -- i.e., less than 30 days after the filing of the amended complaint -- TRI removed the claims in the amended complaint to the United States District and Bankruptcy Courts for the Northern District of Ohio.[3] The District Court consolidated the removed case filed in that court with the removed case filed in the Bankruptcy Court. On competing motions (Petrarca's for remand and TRI's for transfer to the Child World "home" Bankruptcy Court) the Bankruptcy Court held that TRI's bankruptcy removal was

[3] As the District Court in this case observed, there is "a fair amount of confusion among the courts concerning whether notices of removal taken pursuant to 28 U.S.C. § 1452(b) are properly filed with the bankruptcy court instead of the district court," and "TRI's decision to file notices with both the district and the bankruptcy court may fairly be seen as an act of caution given the existing uncertainty." Order, August 11, 1994, at 2-3 n.1. See App. C at pp. 34a, 35a, n.1.



untimely, but that the removal to District Court was timely. Because the district and bankruptcy removals had been consolidated, the Bankruptcy Court then ordered the action transferred.

On Petrarca's appeal, the District Court reversed. The court held, inter alia, that the time for removal arose on the day that Child World filed its Chapter 11 petition (notwithstanding that on that day,[4] *none* of the new claims added by Petrarca's amended complaint had even been asserted). Accordingly, the District Court reversed the order of transfer, and remanded the case to the Bankruptcy Court for further

[4] In fact, the new claims were not asserted until three and a half months after the bankruptcy filing. In short, the district court order -- which found that the time for removal expired 90 days after the May 6, 1992 bankruptcy filing -- would require TRI to remove claims before they were asserted. This cannot, TRI submits, be the law -- and that is the basis upon which TRI appealed to the Sixth Circuit.

proceedings.

TRI timely appealed. The Sixth Circuit, finding that "[a]s a general rule, an order remanding an action to a state court from which is [sic] was removed is not reviewable on appeal or otherwise," *Order*, Sept. 29, 1994 at 1, *see* App. D, ordered TRI to show cause why the appeal should not be dismissed. After that show cause Order was briefed, the Sixth Circuit dismissed the appeal (without addressing the merits[5]), citing two reasons.

First, the Sixth Circuit held that the District Court's ruling on the removal to the District Court (i.e.,

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[5] The Sixth Circuit's Order to Show Cause directed the parties to brief only the issue of appealability, not the substantive issue upon which the appeal was taken. Accordingly, the Sixth Circuit did not consider TRI's argument that the District Court had miscalculated the removal period.



that it was untimely) was not appealable by virtue of 28 U.S.C. § 1447(d). Second, the Sixth Circuit held that the District Court's ruling on the bankruptcy removal was likewise not appealable, this time on authority of three cases from the Courts of Appeal and one from this Court. The Sixth Circuit did not address the contrary authority, or the distinction in 28 U.S.C. § 1452(b) between equitable and other remand orders.

**REASONS FOR GRANTING THE PETITION**

I. APPEAL OF AN ORDER REMANDING A CASE REMOVED PURSUANT TO 28 U.S.C. § 1452(a) IS NOT BARRED IF THE ORDER OF REMAND IS ON JURISDICTIONAL GROUNDS

A. There Is a Direct Conflict in the Circuits on This Important Issue

There is a direct and indubitable conflict among the circuits as to the issue of this case. Five circuit Courts

of Appeal have squarely addressed or squarely decided the question of whether appeal may be had from an order remanding a case on purely jurisdictional grounds, or whether such an appeal is barred by 28 U.S.C. § 1452(b). The court below, following the Seventh and Fifth Circuits, held that *any* remand from a District to a Bankruptcy Court, on whatever grounds, is not appealable to the Court of Appeals or otherwise under 28 U.S.C. § 1452(b).

The Third and Eleventh Circuits hold precisely to the contrary. The circuits hold that the plain language of 28 U.S.C. § 1452(b) can only be read to prohibit remands which are made "on any equitable ground," and that *jurisdictional* remands, like the one in this case, are always reviewable.



That this issue is an important one is clear: it is a "well-established principle that a court will not construe a statute to restrict access to judicial review unless Congress manifests its intent to do so by 'clear and convincing evidence'." South Windsor Convalescent Home, Inc. v. Mathews, 541 F.2d 910, 914 (2d Cir. 1976) (quoting Johnson v. Robison, 415 U.S. 361, 373-74 (1974)). There is no such "clear and convincing evidence" to support the ruling here. In fact, the cases which prohibit appeals of jurisdictional remands rely on something other than the plain language of the statute -- and that reliance is not permitted to a court. E.g., Connecticut National Bank v. Germain, 112 S.Ct. 1146 (1992).

This Court should grant the petition to resolve this conflict. If

it does, TRI will argue that the Third and Eleventh Circuit holdings are correct, for the reasons set forth in this brief.

### B. The Plain Language of the Statute Bars Appeals Only of Equitable Remands

Section 1452(b) governs removal of claims related to bankruptcy cases. Subsection (a) authorizes removal of both cases *and claims*. Subsection (b) governs remand of those cases or claims:

> The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered *under this subsection* remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the Court of Appeals . . .

(emphasis added). By its plain terms, subsection (b) comprehends remands on



*equitable* grounds -- e.g., grounds relating to whether the District Court should or must abstain under 28 U.S.C. § 1334(c) -- pursuant to which a court, *in its discretion,* determines whether a "related to" action should be heard in the federal or state court.

By explicit reference to "any equitable ground," the statute carves out remands on other grounds -- it cannot be read otherwise. A jurisdictional remand, like the one at issue here, is not a matter for a court's discretion: either there is jurisdiction or there is not. The District Court below found jurisdiction lacking (because it held the removal untimely), but the District Court did not address any of the abstention or other issues urged by Petrarca in his

motion to remand.[6]

C. The Cases Relied Upon by the Court Below Are Not in Accord With the Plain Language of the Statute

Thus, the nonreviewability bar of § 1452(b) -- which prohibits appeals *only* of remands entered "under this subsection" (which can only mean remands on "any *equitable* ground") does not apply. And this was the precise holding of *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984). *Pacor* held that "Section 1478(a) [the predecessor to § 1452(a)] authorizes a very

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[6] As the lower bankruptcy court found, issues of abstention and remand should be addressed by the "home" bankruptcy court. The proper role of the "conduit" bankruptcy court is simply to transfer to the "home" bankruptcy court, which will be "more familiar with the pending bankruptcy case and what would be required for efficient administration." Memorandum of Decision on Motion to Remand and Motion to Transfer Venue, June 25, 1993, pp. 3, 4, see App. C at p. 23a, 24a. See also In re Aztec Industries, Inc., 84 B.R. 464 (Bankr. N.D. Ohio 1987).



different type of removal than does section 1441," 743 F.2d at 991, and that the general removal provisions could not and should not be applied to bankruptcy removals, 743 F.2d at 991-92. It then read the nonreviewability bar of § 1478(b) by its plain language: i.e., that remands on *equitable* grounds were not reviewable. Since the *Pacor* District Court had held that the original suit was not "related to" bankruptcy proceedings, and thus that it lacked jurisdiction, the Third Circuit accepted jurisdiction over the appeal. Accord, In re *National Developers, Inc.*, 803 F.2d 616, 619 (11th Cir. 1986) (adopting the reasoning of *Pacor* and *Browning v. Navarro*, 743 F.2d 1069, 1076 n.21 (5th Cir. 1984)); *see also National City Bank v. Coopers and Lybrand*, 802 F.2d 990 (8th Cir. 1986) (declining to

hear appeal of remand order based on lack of federal question jurisdiction under § 1331, but accepting appeal jurisdiction over remand of bankruptcy removal).

The court below did not address the *Pacor* distinction between "equitable" remands and other remands. Rather, it simply held that appellate review of a § 1452 remand is barred, and then cited to four cases, without citing or addressing the contrary authority.

Of those four cases, *Hernandez v. Brakegate*, 942 F.2d 1223, 1225-26 (7th Cir. 1991) contains the most in-depth analysis. *Hernandez* held that remands under 28 U.S.C. § 1447(c) are not reviewable (because of § 1447(d)), and that § 1452 remands are still subject to the nonreviewability bar of § 1447(d). As to the statutory distinction drawn by



*Pacor* between remands "under this subsection" and other remands, the Seventh Circuit found it to be "clever rather than correct," 942 F.2d at 1225. After discussing the various policy reasons why, in its opinion, even matters of jurisdiction should be nonreviewable, the court then reformed the language used by Congress: "'Equitable' in § 1452(b) makes more sense if it means 'appropriate.'" 942 F.2d at 1226.

The other case cited by the Sixth Circuit which squarely considers, and rejects, the statutory language is *Sykes v. Texas Air Corp.*, 834 F.2d 488 (5th Cir. 1987). Like *Hernandez*, *Sykes* recognized the distinction in the statute but declined to give it effect, calling it "a sort of semantic crack in the statute," 834 F.2d at 490.

The Sixth Circuit also followed its own precedent, *Boone Coal and Timber Co. v. Polan,* 787 F.2d 1056 (6th Cir. 1986). *Boone Coal* rejected *Pacor,* instead finding a line of Fifth Circuit cases more persuasive, including, primarily, *Browning v. Navarro,* 743 F.2d 1069 (5th Cir. 1984).

The Browning case was undeniably germane authority for the *limited* proposition that equitable remands are non-reviewable. But *Browning* also recognized and endorsed the distinction between reviewability of remands on equitable grounds, and of those based on jurisdictional grounds, which had been drawn by the Third Circuit in *Pacor*:

> Nonreviewability extends only to the discretionary decision to remand or not to remand a properly removed action, not to whether the Bankruptcy Court originally had jurisdiction over the



> matter. . . There is no dispute in the instant case that the Bankruptcy Court had jurisdiction to act and the manner in which it acted is not subject to our review. In *Pacor* . . the Third Circuit held that, § 1478(b) [the predecessor to § 1452(b)] notwithstanding, it could review a remand order when the Bankruptcy Court [believed that it] lacked jurisdiction under § 1471(b) [now § 1334] because the removed proceeding was not "related to" bankruptcy. In contrast, the instant action involves a decision by the Bankruptcy Court, having jurisdiction and in the exercise of its discretion, to remand the 1979 case.

*Browning*, 743 F.2d at 1076 n. 21 (emphasis added).[7] Thus *Browning* acknowledged the *Pacor* distinction which was simply ignored by the Court in *Boone*

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[7] The quoted language of Browning was disavowed in Sykes v. Texas Air Corporation, 834 F.2d 488 (5th Cir. 1987) but of course Sykes had not been decided at the time of Boone Coal, and, as set forth in the text infra, Sykes is open to question as to its continued validity.

*Coal*, and properly determined that it could not review an order of remand based on equitable considerations.

Finally, the order below cited *United States v. Rice*, 327 U.S. 742, 752 (1946). That case involved a state court petition for administration of the estate of a restricted Indian member of the Five Civilized Tribes in Oklahoma and a claim of interest in certain lands in connection therewith. Such petitions were governed by the Act of April 12, 1926, which, inter alia, gave the United States the right to intervene and remove.

The United States did so. The District Court then dismissed the complaint in intervention, and remanded the case to state court for want of jurisdiction. The question before this Court was whether the Court of Appeals



could review that remand by mandamus. This Court held that no such review was available, observing that the Act of 1887 (i.e., the predecessor to 28 U.S.C. § 1447(d)) was "intended to be applicable not only to remand orders made in suits removed under the Act of 1887, but to orders of remand made in cases removed under any other statutes, as well." 327 U.S. at 752.

For two reasons *Rice* is not on point. First, the Act of 1926 did not contain any "provisions respecting remand or any mode of review of an order of remand." 327 U.S. at 748. Given the statutory silence as to remand or review of remand, it was necessary to look to the more general removal statute to fill in the gaps. Second, § 1452 did not exist at the time *Rice* was decided.

D. Cardinal Canons of Statutory Construction Require that the Plain Language of the Statute be Given Effect; § 1447(d) Does Not Bar Appeal of Bankruptcy Remands

The *Hernandez* and *Sykes* interpretations are contrary to standard canons of statutory construction. If a statute has a "semantic crack," it may be the job of Congress to fix it, but the job of the courts is to apply it as written, crack or no:

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.

*Connecticut National Bank v. Germain*, 112 S.Ct. 1146, 1149 (1992).

Nor is it correct to say, as the *Hernandez* court did, that Congress could not have meant "equitable" because there



is no longer a law/equity distinction.

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

*Morissette v. United States*, 342 U.S. 246, 263 (1952); *see also United States v. Shabani*, 63 U.S.L.W. 4001, 4002 (1994) (it is a settled principle of statutory construction that Congress intends, absent contrary indications, to adopt the common law definition of statutory terms).

Moreover, the legislative history

shows that Congress could not have intended that §§ 1441-1447 apply to the § 1452 removals. Clearly §§ 1441-1447 were inapplicable to bankruptcy removals before *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); when Congress re-enacted § 1478 as § 1452 it could not have intended to change that circumstance, *see Pacor, Inc. v. Higgins*, 743 F.2d at 991-92 nn. 11,12,13.

In short, though the Hernandez court thought that "appropriate" was a more sensible word in the context, Congress did not use the word "appropriate." It used the word "equitable," which does not mean "jurisdictional."



And other rules of statutory construction also militate in favor of the Pacor interpretation and against the Hernandez line. An interpretation of § 1452(b) which reads it as prohibiting all appeals of remand orders, whether on "any equitable ground" or on a jurisdictional ground, would render § 1452(b) superfluous and wholly circumscribed by § 1447(d): if review of any remand order is never allowed under the latter statute, there is no reason for the bar of the former. No statutory provision should be construed to be entirely redundant, Kungys v. United States, 108 S. Ct. 1537, 1550 (1988), and interpretation that renders a statute superfluous should be avoided where possible, Thomas Jefferson University v. Shalala, 114 S. Ct. 2381, 2396 (1994).

## CONCLUSION

For the reasons stated herein, this Court should review this case in order to resolve this conflict in the lower courts and to address the statutory distinction between equitable and jurisdictional remands in the context.

Respectfully submitted,

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March, 1995

APPENDIX A

No. 94-3980
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Entered: November 15, 1994

ANTHONY A. PETRARCA,

Plaintiff-Appellee,

v.

THINGS REMEMBERED, INC.

Defendant-Appellant.

ORDER

Before: MARTIN and BATCHELDER, Circuit Judges; and ENSLEN, District Judge.*

This action, initially filed in the Court of Common Pleas of Summit County, was removed by defendant pursuant to 28 U.S.C. §§ 1441 and 1452. Finding that the notices of removal were not timely filed, the district court remanded the action to state court. Defendant filed

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*The Honorable Richard A. Enslen, United States District Judge for the Eastern District of Michigan, sitting by designation.

a notice of appeal of the remand order. In response to a show cause order issued by the court, defendant argues that the remand order is reviewable on appeal. Plaintiff asserts that the court lacks jurisdiction to consider the appeal.

As a general rule, an order remanding an action to a state court from which it was removed "is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d). Defendant argues that this general prohibition against appellate review is not applicable because this action was removed and remanded pursuant to the bankruptcy removal statute, 28 U.S.C. § 1452. The record clearly demonstrates that defendant sought removal pursuant to the general removal statute and that the district court held that the notice of removal was not filed within the time



required by 28 U.S.C. § 1446(b). Thus, section 1447(d) prohibits review of that ruling. *See Ohio v. Wright*, 992 F.2d 616, 618-19 (6th Cir. 1993); *Baldridge v. Kentucky-Ohio Transportation, Inc.*, 983 F.2d 1341, 1343-50 (6th Cir. 1993). In addition, the district court held that the notice of removal pursuant to section 1452 was not timely filed. Appellate review of that ruling is likewise barred. *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223, 1225-26, (7th Cir. 1991); *Sykes v. Texas Air Corp.*, 834 F.2d 488, 590-91, (5th Cir. 1987); *Boone Coal and Timber Co. v. Polan*, 787 F.2d 1056, 1060, (6th Cir. 1986); see *United States v. Rice*, 327 U.S. 742, 752 (1946).

It is therefore ORDERED that the appeal is dismissed *sua sponte* for lack of jurisdiction.

ENTERED BY ORDER OF THE COURT

/s/

Clerk



APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 532
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Filed: January 12, 1995

Mark A. Gamin
Thompson, Hine and Flory
629 Euclid Avenue
Suite 1100 National City Bank Building
Cleveland, OH 44114

RE: 94-3980
Petrarca vs. Things Remembered
District Court No. 93-01582

Dear Mr. Gamin:

Enclosed is a copy of an order which was entered today in the above styled case.

Very truly yours,

/s/
Leonard Green, Clerk
(Mrs.) Peggy Eshman
Administrative Assistant

Enclosure

cc:
Mr. John C. Weisensell

No. 94-3980
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Entered: January 12, 1995

IN RE: CHILD WORLD, INC.

ANTHONY A. PETRARCA,

Appellee,

v.

THINGS REMEMBERED, INC.

Appellant.

ORDER

BEFORE: MARTIN and BATCHELDER, Circuit Judges; and ENSLEN,* District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having

*Hon. Richard A. Enslen, United States District Judge for the Western District of Michigan, sitting by designation.



requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

Entered: June 25, 1993

| | | |
|---|---|---|
| IN RE: | ) | ADVERSARY |
| | ) | PROCEEDING |
| | ) | 92-5207 |
| ANTHONY PETRARCA | ) | |
| | ) | |
| Plaintiff | ) | RELATED CASE |
| | ) | CHILD WORLD, |
| v. | ) | INC. CHAPTER |
| | ) | 11 PENDING IN |
| | ) | THE BANKRUPTCY |
| CHILD WORLD, INC. | ) | COURT FOR THE |
| et al. | ) | SOUTHERN |
| | ) | DISTRICT OF |
| Defendant | ) | NEW YORK |
| | ) | CASE NO. 92 |
| | | B20 887(HS) |

**MEMORANDUM OF DECISION ON MOTION TO REMAND A MOTION TO TRANSFER VENUE**

Before this court is a motion filed by plaintiff Anthony A. Petrarca ("Petrarca") to remand this action to state court. Also before this court is a motion by defendant Things Remembered, Inc. ("TR") for transfer of venue to the



U.S. Bankruptcy Court, Southern District, New York. A pre-trial conference was held on these motions and no hearings were requested by the parties and the court finds counsel has waived any request for a hearing. Upon review of the record and pleadings, this court concludes that the removal was proper and the motion for transfer of venue shall be granted. This court shall defer all other issues to the Bankruptcy Court, Southern District, New York.

Before discussing the applicable law, a brief review of the background of this proceeding is necessary.

TR and Child World, Inc. ("Child World") jointly filed a notice of removal in this court and the U.S. District Court, Northern District of Ohio, on September 25, 1992, on an

action pending against them in the court of Common Pleas, Summit County, Ohio, being titled Petrarca v. Child World, Inc. et al., Case No. CV-92-03-1069 (the "State Action").

Prior to the removal, on March 18, 1992, Petrarca commenced the State Action against Child World and Cole National Corporation ("Cole"). TR is a successor, by merger, to Cole. The basis of the State Action relates to Child World's alleged breach for failure to pay rent under two commercial lease agreements. The parties to the leases are Petrarca and Child World. The State Action also seeks payment from Cole based upon an alleged guaranty of the performance of Child World under the leases. Child World filed for protection under chapter 11 of the U.S. Bankruptcy Code on May 6, 1992 in the



U.S. Bankruptcy Court, Southern District, New York.

On August 28, 1992 Petrarca filed its first amended complaint (the "amended complaint") in the State Action. (See, Exhibit D to Motion to Remand). The amended complaint indicates that Child World had filed for chapter 11 protection and also alleges additional lease claims against Child World and TR.

The leases in the State Action have been rejected in the Child World Bankruptcy case pursuant to applicable bankruptcy law.

In the State Action, TR also filed a motion to dismiss Petrarca's amended complaint or stay proceedings related thereto until the Bankruptcy Court, Southern District, New York, has determined the extent of Child World's

obligations, as tenant, under the leases.

Also pending, from the District Court file records, is a motion filed by National Fire Insurance Company of Hartford to intervene in this proceeding.

On March 8, 1993, TR and Colfax Manor Gardens, a counterclaim defendant, filed a stipulated notice of dismissal which dismissed a third party complaint filed against Colfax Gardens.

On March 26, 1993, the removal action pending in District Court was transferred and consolidated with the removal filed in this court. Although other motions have been filed, this court will only address whether the removal of this action was proper in order to confer jurisdiction on this court.



This court has reviewed the decision of Judge Speer in re Aztec Industries, Inc., 84 B.R. 464 (Bankr. N.D. Ohio 1987) and finds the facts similar to this case and also finds his reasoning persuasive. In Aztec a state action was removed to the bankruptcy court and a motion to transfer the removed case to the bankruptcy court in Oklahoma was filed. Judge Speer determined that he was required to review the jurisdictional issues only. The action was found to be properly removed and the motion to transfer was granted. Judge Speer noted that the "home" bankruptcy court in Oklahoma was more familiar with the pending bankruptcy case and what would be required for efficient administration. Judge Speer followed the rationale of a similar case and stated:

> the proper role of the "conduit" court was to transfer the action to the "home" Bankruptcy Court to decide the issue of whether to remand or abstain from hearing the action.

Id. at 467 citing In re Convent Guardian Corp., 75 B.R. 346, 347 (Bankr. E.D. Pa. 1987).

This court agrees with Judge Speer and, accordingly, will only address the issue of removal to determine if this court has proper jurisdiction of this matter.

Petrarca contends the State Action should be remanded because this case was wrongfully removed to this court. Petrarca also requests this court order TR to pay its costs and fees as a result of the alleged wrongful removal.

Petrarca contends the removal was improper because: (1) it was not timely filed; and (2) TR has waived its right



to removal because it filed permissive offensive counterclaims and crossclaims.

Although TR indicates it "attempted to be as concise as possible" it has submitted an exhaustive 38 page memorandum in opposition to the motion to remand. In its effort to be concise, TR has included string cites for fundamental propositions of law, many of these string cites exceed one page. See, eg. pp. 9-10; pp. 15-16. TR also states Petrarca's 27 page memorandum in support exceeds the 15 page limit of Local Rule 8:8.1(f). TR was granted leave to file its 38 page memorandum. This court takes note that Petrarca's memorandum exceeds the 15 page limit without court approval. However, after reviewing both memoranda, this court's only comment is that if the 15 page limit was observed by both sides, all

parties to this action would have been better served by their counsel.

**The Removal to District Court**

TR contends it timely removed the State Action to District Court because it did not become removable until after the amended complaint was filed on August 28, 1992.

28 U.S.C. §1446(b) states, in relevant part:

> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.



TR contends it received the amended complaint on August 31, 1992, which contained ten additional counts on additional lease guaranties which required the application of federal bankruptcy law. Thus, TR states, its removal filed on September 25, 1992 was within the 30 day period under §1446(b).

This court agrees with TR. The court has reviewed the original complaint and the amended complaint (Notice of Removal, Exhibits 1 and 27) and finds that the parties are the same and the only change in the amended complaint is the addition of ten claims based on other leases and guaranties between the parties. The new claims against TR address additional leases and also indicate that Child World is operating under federal bankruptcy law protection. The claims are state law

claims, but, because they involve lease rejection and guaranty claims, they are specifically and exclusively addressed in the bankruptcy code. Thus, it is the opinion of this court that the action became removable to District Court upon the service of the amended complaint which indicated Child World had filed a petition in bankruptcy. Thus, the notice of removal filed on September 25, 1992 in the District Court was timely under §1446(b). Striff v. Mason, 849 F.2d 240, 244 (6th Cir. 1988) (an action may be removed "where the real nature of the claim asserted in the complaint is federal, irrespective of whether it is so characterized"); E.W. Bowman, Inc. v. Norfolk and Western Railway Co., 403 F. Supp. 389, 390 (W.D. Pa. 1975) "([federal] question must appear in plaintiff's complaint by direct and



positive allegations or by necessary implication from the matters alleged").

**The Removal to Bankruptcy Court**

Federal Rule of Bankruptcy Procedure ("Rule") 9027 addresses removal actions and provides, in relevant part:

> (2) TIME FOR FILING; CIVIL ACTION INITIATED BEFORE COMMENCEMENT OF THE CASE UNDER THE CODE. If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a notice of removal may be filed only within the longest of (A) 90 days after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under § 362 of the Code, or (C) 30 days after a trustee qualifies in a chapter 11 reorganization case but not later than 180 days after the order of for relief.

Rule 9027(a)(2).

Petrarca contends the removal to this court was outside the 90 day time

period and, therefore, must be remanded. This court agrees that the removal to this court was untimely. In reviewing Rule 9027, it appears that the 90 day time limit is the only provision applicable to this case. There is no indication before this court that an applicable order for relief from stay was entered or that a chapter 11 trustee has been appointed in the Child World case. The State Action was initiated before the bankruptcy filing of Child World on May 6, 1992, thus, the removal had to be filed no later than 90 days thereafter, which is August 5, 1992. However, the notice of removal was filed on September 25, 1992 in this court, clearly beyond the time limit. Thus, this court finds the bankruptcy removal is untimely.



However, because the removal was timely filed in the District Court, as stated earlier, and subsequently consolidated with the pleadings filed herein, this court finds that TR has filed a timely removal.

Petrarca also argues that TR has waived its right to remove this action by filing permissive offensive counterclaims and crossclaims in the state court. TR responds that it could not have waived its right to removal when it filed the counterclaims and crossclaims on June 26, 1992, because it had no right to remove until the amended complaint was later filed and served August 31, 1992.

This court agrees with TR's position. Petrarca argues that a waiver of a right to removal occurs when a defendant files a permissive pleading

seeking affirmative relief and cites in support, inter alia, Bedell vs. H.R.C. Ltd., 522 F. Supp. 732 (E.D. Ky. 1981).

In Bedell the court explained that a defendant may waive its right to remove an action by taking certain acts in state court that are deemed to constitute a submission to its jurisdiction. 522 F. Supp. at 737. Such acts may include the filing of a permissive crossclaim. Id. Other acts that could result in a waiver of the right to remove are the filing of pleadings seeking affirmative relief resulting in an adjudication on the merits of an issue which could result in the dismissal of the action in whole or in part. Id. at 738.

This court does not disagree with the holding in Bedell but does find another case cited more instructive.



The court in Bolivar Sand Company, Inc. v. Allied Equipment, Inc., 631 F. Supp. 171, 172 (W.D. Tenn. 1986) explains that a right to remove can only be waived by actions of the defendant after the case clearly becomes removable. See also Johnson v. Celotex Corp., 701 F. Supp. 553, 554 (D.Md. 1988).

Accordingly, in the context of this case, because TR's right to remove the state court action on federal question grounds did not arise until August 31, 1992 (the date on which it first received a copy of Petrarca's amended complaint), very simply, whatever TR or Child World did prior to that date could not possibly have constituted a waiver of the right to remove this action.

This court finds that TR did not waive its right to remove this action and removal was proper. Therefore, this

court finds it has jurisdiction to consider the motion to transfer venue. Furthermore, as this court finds that removal was proper Petrarca's motion for costs and fees incurred as a result of removal shall be denied.

**Motion to Transfer Venue**

TR requests this court transfer this proceeding to the Bankruptcy Court in the Southern District of New York, where the Child World case is currently pending. TR relies on Aztec, supra, and Dunkirk Limited Partnership v. TJX Companies, Inc., 139 B.R. 643 (N.D. Ohio 1992).

This court agrees with the holding in Aztec that this action should be transferred to the "home" bankruptcy court in New York. As discussed earlier, this court finds this action was properly removed and thus,



jurisdiction is proper to consider the motion to transfer venue.

Accordingly, this court adopts the sound reasoning of Judge Speer in Aztec at page 467:

> In addition, the Court which would try the case can better evaluate all the interests involved, and determine its own expertise in the particular areas of the law which form the basis of the action, as well as its own scheduling and time constraints. This [conduit] Court's speculation on these matters would not be an adequate substitute for a knowledgeable determination based upon the actual facts and circumstances. Moreover, allowing the Oklahoma Court to rule on the remand issues minimizes the potential conflicts which could arise due to differences in controlling authority between the Courts. Accordingly, a final ruling on the venue issues, and the many sub-issues which have been raised within the context of venue, remand, and abstention, should be left to the "home" Bankruptcy Court in Oklahoma.

This court also finds Dunkirk persuasive authority wherein Judge Battisti enforced a stay of a removed state action based upon a lease dispute. The Dunkirk court held that allowing the action to go forward in state court "would be contrary to federal policies designed to reach just and efficient results by bringing together as much as possible litigation affecting a bankrupt estate". Id. at 647.

Therefore, based upon the foregoing, this court shall enter a separate order denying Petrarca's motion for costs and fees and granting the motion of Things Remembered to transfer venue to the Bankruptcy Court for the Southern District of New York.

June 25, 1993 /s/
H.F. WHITE
Bankruptcy Judge



**CERTIFICATE OF SERVICE**

I hereby certify that on the 25th day of June, 1993 a copy of the attached Memorandum of Decision on Motion to Remand and Motion to Transfer Venue was sent by first class mail to each of the parties listed below.

/s/
Terri Hawkins
Chapter 11 Case
Administrator

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Counsel for Child World, Inc.

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

Entered: June 25, 1993

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|---|---|
| IN RE: | ADVERSARY PROCEEDING 92-5207 |
| ANTHONY PETRARCA<br>Plaintiff | |
| v. | RELATED CASE CHILD WORLD, INC. CHAPTER 11 |
| CHILD WORLD, INC., et al. | PENDING IN SOUTHERN DISTRICT OF NEW YORK CASE NO. 92 B20 887(HS) |
| Defendant | |

**ORDER GRANTING MOTION TO TRANSFER VENUE AND DENYING MOTION FOR COSTS AND FEES**

Based upon the "Memorandum of Decision on Motion to Remand and Motion to Transfer Venue" entered by this court on the 25th day of June, 1993;

It is the order of this court that the motion for costs and expenses related to the removal of this action filed by Anthony A. Petrarca is DENIED;



It is the further order of this court that the motion filed by Things Remembered, Inc., to transfer venue of this action to the U.S. Bankruptcy Court, Southern District of New York, wherein is pending the related case Child World, Inc., case no. 92 B20 887(HS) is GRANTED.

So ordered this 25th day of June, 1993.

/s/
H.F. WHITE
Bankruptcy Judge

**CERTIFICATE OF SERVICE**

I hereby certify that on the 25th day of June, 1993, a copy of the attached Order Granting Motion to Transfer Venue and Denying Motion for Costs and Fees was sent by first class mail to each of the parties listed below.

/s/
Teri Hawkins
Chapter 11
Case Administrator

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Entered: August 11, 1994

| | | |
|---|---|---|
| Anthony A. Petrarca | ) | CASE NO. |
| | ) | 5:93-CV-1582 |
| | ) | |
| Plaintiff/Appellant, | ) | |
| | ) | BANKRUPTCY |
| -vs- | ) | CASE NO. |
| | ) | 92-5207 |
| Things Remembered, Inc. | ) | |
| | ) | |
| Defendant/Appellee. | ) | Judge Sam |
| | ) | H. Bell |
| | ) | |

O R D E R

Presently before the court is Plaintiff-Appellant Anthony Petrarca's appeal from the U.S. Bankruptcy Court for the Northern District of Ohio's order granting Defendant/Appellee's motion to transfer venue (docket #9).



**STATEMENT OF FACTS**

The plaintiff, Anthony Petrarca, initiated this action in the Court of Common Pleas, Summit County, Ohio on March 18, 1992. His four count complaint asserted claims against Child World as lessee and Cole National as guarantor for delinquent rents, future rents (pursuant to an acceleration clause), unpaid common area maintenance costs, taxes, insurance, and late fees from two leases. On April 14, 1992 Things Remembered, Inc. ("TRI") voluntarily entered the case as the successor by merger to Cole National and filed for Leave to Plead.

On May 6, 1992, Child World filed Chapter 11 petitions in the U.S. Bankruptcy Court for the Southern District of New York. Child World filed a suggestion of stay in the Summit

County Common Pleas Court on May 11, 1992, and that court transferred the case (against only Child World) to its inactive docket on May 22. Child World simultaneously rejected the leases.

TRI filed its answer to Petrarca's complaint on May 28, 1992; it filed an amended answer with counterclaim against Petrarca and Colfax Manor Gardens on June 26, claiming that its guarantees were limited and that Petrarca's assignment of the leases to Colfax without Cole National or TRI's consent discharged TRI of its obligations. TRI also claimed in the amended answer that Child World's Chapter 11 bankruptcy filing allowed Child World to reject the leases.

On August 28, 1992, Petrarca filed an amended complaint bringing ten additional claims regarding five other



leases against TRI and Cole National. Recognizing Child World's Chapter 11 status and the Summit County stay, Petrarca did not bring any additional claims against Child World.

On September 25, 1992, TRI filed Notices of Removal in the Summit County court, the U.S. Bankruptcy Court for the Northern District of Ohio, and the United States District Court for the Northern District of Ohio.[1] In support

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[1]There remains a fair amount of confusion among courts concerning whether notices of removal taken pursuant to 28 U.S.C. §1452 are properly filed with the bankruptcy court instead of the district court. See In re Aztec Industries, Inc., 84 B.R. 464, 468 (Bankr. N.D. Ohio 1987) (holding that petition may be filed directly with the bankruptcy court and citing supporting, as well as contradictory, authority). TRI's decision to file notices with both the district and the bankruptcy court may fairly be seen as an act of caution given the existing uncertainty. The unfortunate consequence of this dual filing was the engendering of separate proceedings involving one and the same action within the single court system.

Although the two matters were ultimately "consolidated" by the district court, a more appropriate course, it seems, would have called for this court to determine whether it or the bankruptcy court property retained jurisdiction

of removal, TRI argued that only the home bankruptcy court in New York could determine the extent of Petrarca's lease rejection damages, if any, after determining Child World's obligations under the leases. This being true, TRI reasoned, TRI's obligations as Child World's guarantor must also be measured by, or with reference to, Child World's obligations as determined under the bankruptcy code. Accordingly, TRI explained, the matter involved in a federal question and was properly removed pursuant to 28 U.S.C. §1441. Relying upon the same assumptions, TRI further reasoned that the case was "related to" Child World's bankruptcy

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over the matter. While TRI presumably had two adequate, independent bases for removal, it plainly did not have two separately removable actions.



proceeding in New York and was therefore removable under 28 U.S.C. §1452.

Plaintiff filed a motion to remand with the district court on October 23, 1992. Judge Aldrich eventually transferred the district court case to the bankruptcy court for consolidation with the matter pending before Bankruptcy Judge White.

On May 25, 1993, the Ohio bankruptcy court granted a motion by TRI to transfer venue to the United States Bankruptcy Court for the Southern District of Ohio. In so doing, Judge White determined that the notices of removal were timely filed, that TRI had not waived the right to remove the action, and that the court's sole role as a "conduit" bankruptcy court was to transfer the case to the "home" court in New York.

Petrarca now appeals Judge White's May 25, 1993 order.

**LAW AND ANALYSIS**

Petrarca raises three issues in its appeal. First and foremost, it challenges as erroneous the determination by the bankruptcy court that TRI timely removed the State action. Second, Petrarca claims that the bankruptcy court erred in finding that TRI did not waive its right to remove the action. Third, TRI objects to the bankruptcy court's refusal to abstain from hearing the removed action. Because the objections raised concern conclusions of law reached by the bankruptcy court, this Court reviews the matter de novo. In re Edward M. Johnson, 845 F. 2d 1395, 1398 (6th Cir. 1988).



**I. Timeliness of Removal.**

As mentioned above, TRI purported to remove this matter from state court pursuant to two independent federal statutes. Petrarca moved the bankruptcy court to remand the action for want of jurisdiction, arguing that TRI had failed to remove the matter within the time period provided by either statute. The bankruptcy court held that TRI failed to remove the matter pursuant to §1452 (bankruptcy removal) of Title 28 in a timely manner. The bankruptcy court further held, however, that TRI's removal was timely under §1441 (federal question removal) of the same title, and, for that reason, the court believed itself to have jurisdiction to consider TRI's motion to transfer.

**A. Timeliness of Federal Question Removal**

Section 1331 of Title 28 provides the federal district courts original jurisdiction over all civil actions "arising under the Constitution, law, or treaties of the United States." 28 U.S.C. §1331. Section 1441 of the same title allows for the removal to federal district court of "any civil action brought in a State court of which the district courts of the United States have original jurisdiction...." 28 U.S.C. §1441. As discussed above, because TRI believed the application and construction of Title 11 to be determinative of the present dispute, it relied in part upon §1441 in removing the action to the district court.

The chief issue of contention between the parties concerns the



timeliness of TRI's notice of removal. At the core of this dispute is the language of 28 U.S.C. Section 1446(b), which sets forth the appropriate time frame for removing matters deemed removable under §1441. Section 1446(b) provides in relevant part:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed <u>within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may be ascertained that the case is one which is or has become removable</u>, except that a case may not be removed on the basis of

> jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. §1441(b) (emphasis added).

Petrarca's original complaint did not, when filed, implicate the federal bankruptcy code or any other provision of federal law. Therefore, it was not immediately removable, and the thirty day period in which to remove did not begin to run upon service of the summons as provided in the first paragraph of §1446(b). Rather, the filing period commenced "after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it ... [was ascertainable] that the case [was]" removable. The pertinent question for our immediate purpose thus becomes, "What form of notice to the



defendant is required to trigger the clock on the thirty-day filing period provided in the second paragraph of §1446(b)?"

Two competing views have polarized courts faced with the same question. Many courts interpret §1446(b) strictly to require that the defendant receive formal notice from a voluntary act of filing taken by the plaintiff. Apache Nitrogen Products, Inc. v. Harbor Insurance Co., 145 F.R.D. 674 (D. Ariz. 1993); Phillips v. Allstate Insurance Co., 702 F. Supp. 1466 (D. Cal. 1989); Jong v. General Motors Corporation, 359 F. Supp. 223 (N. D. Cal. 1973) Under this view, unless the grounds for removal appear on the face of a pleading or other filing by the plaintiff, the defendant is free to rest upon his right to remove, regardless of

his actual knowledge of grounds upon which to do so. See, e.g., Jong, 359 F. Supp. at 226 ("Therefore, the time period to remove an action cannot depend on defendant's actual knowledge, because the statute expressly allows a defendant to rely on papers presented to it.").

Consistent with this line of authority, TRI argues that the thirty-day period in which it would remove this action began on August 31, 1992 -- the date on which Petrarca served TRI with a paper (its amended complaint) containing specific reference to Child World's bankruptcy.

Judge White accepted as persuasive TRI's arguments and authority, holding "the action became removable to District Court upon the service of the amended complaint on August 31 which indicated Child World had filed a petition in



bankruptcy." Memorandum of Decision filed June 25, 1993, p. 5. Thus, he concluded, TRI's notice of removal filed September 25, 1992 was timely. Id.

Petrarca finds fault with the Bankruptcy Court's narrow reading of §1446(b)'s notice requirement because such a reading ignores TRI's actual knowledge of grounds for removal. Adopting the alternative view, Petrarca insists that the removal period commenced on May 6, 1992 when Child World filed its petition for relief under Chapter 11 and thereby gave TRI actual, if not formal, notice of such grounds.

Petrarca is not alone in arguing the propriety of construing §1446(b)'s notice requirement liberally. See e.g. Mielke v. Allstate Ins. Co., 472 F.Supp. (E.D. Mich. 1979) (no additional time

for removal is allowed if the presence of removal grounds is unambiguous in light of the defendant's knowledge and the claims of the initial complaint); Weaver v. Miller Electric Mfg. Co., Inc., 616 F.Supp. 683 (S.D. Ala. 1985) (the defendant should remove the case if it comes by knowledge, independent of the plaintiff, requiring removal and should not sit upon its rights). In their widely regarded treatise, Wright, Miller and Cooper opine that §1446(b)'s "clear purpose to commence the running of the thirty-day period once the defendant received actual notice that the case has become removable ...." C. Wright, A. Miller, and E. Cooper, Federal Practice and Procedure: Jurisdiction and Related Matters, §3732, p. 520 (1985) (emphasis added).



This Court need not weigh afresh the competing arguments concerning the form of notice necessary to start §1446(b)'s thirty-day clock; the Sixth Circuit Court of Appeals has already considered and answered the question. In Holston v. Carolina Freight Carriers Corp., No. 90-1358, 1991 WL 112809, at **3 (6th Cir. June 26, 1991), the court held:

> 1446(b) starts the thirty day period running from the date that a defendant has solid and unambiguous information that the case is removable, even if that information is solely within its own possession.....Any ambiguity regarding the scope of 1446(b) must be resolved in favor of remand to the state courts.

Believing §1446(b) to be ambiguous on its face, the court construed the statute so as to prevent a defendant from "sit[ting] upon information in its possession until it feels the time is

right to trigger removal ..." after having forced the plaintiff to exhaust his resources in the state court. Id. at **4. In so doing, the court specifically discounted the applicability of the "Voluntary Act" doctrine in matters involving federal question (as opposed to diversity) removal. Id. at **5.

Holden teaches that §1446(b)'s thirty-day filing period commences once the defendant gains "solid and unambiguous information that the case is removable," regardless of the source of that information. Id. at **3. Petrarca contends that TRI received actual notice that the case was removable on May 6, 1992 when Child World filed chapter 11 petitions. TRI claims that it did not have notice until August 31, 1992 when it was served with Petrarca's amended



complaint bringing new claims for other leases which involved the application of bankruptcy law.

The facts and pleadings placed before this Court demonstrate that the Petrarca's amended complaint was merely the procedural tool with which TRI procured removal as opposed to the actual source from which TRI discovered the basis for that removal. The amended complaint does not allege facts concerning Child World's bankruptcy petition which were unknown to TRI. Given the corporate relationship between the two defendants, it is nearly impossible to imagine that TRI was unaware on May 6, 1992 that Child World was filing a bankruptcy petition. Assuming arguendo it was unaware on May 6, it plainly had knowledge of the bankruptcy proceedings on June 26, 1992,

the date on which it filed its amended answer. In that answer, TRI pointed to Child World's petition as justification for Child World's rejection of its leases. Thus, TRI plainly had solid, unambiguous information from which it had received actual notice of the bankruptcy by June 26, 1992. This being true, the September 25, 1992 notice of removal was plainly without the thirty-day period for removal provided by §1446(b).

**B. Timeliness of the bankruptcy court removal**

Having determined that TRI did not timely remove this matter pursuant to 28 U.S.C. §§1441 and 1446, the Court considers whether TRI nonetheless properly removed it under 28 U.S.C. §1452. Section 1452 provides specifically for the removal of claims



related to bankruptcy cases. It states in part:

> (a) A party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334[2] of this title.

28 U.S.C. §1452.

Bankruptcy Rule 9027 (titled "Notice of Removal") places temporal limitations upon the removal of claims or causes under §1452. In re Aztec Industries, Inc., 84 B.R. 464, 469 (Bankr. N. D. Ohio 1987). Rule 9027(a) provides in part:

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[2] Section 1334 provides the district courts with original jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. §1334.

> (2) If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a notice of removal may be filed only within the longest of (A) 90 days after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay if the claim or cause of action in a civil action has been stayed under Section 362 of the Code, or (C) 30 days after a trustee qualifies in a Chapter 11 reorganization case but not later than 180 days after the order for relief.
>
> (3) If a case under the Code is pending when a claim or cause of action is asserted in another court, a notice of removal may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim or cause of action sought to be removed or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

Bankruptcy Rule 9027(a)(2) & (3).



Petrarca initiated the state action on March 18, 1992. The "related" case under the bankruptcy code commenced on May 6 of the same year when Child World filed its Chapter 11 petitions in New York. Since the Ohio state action preceded the related bankruptcy action, the bankruptcy court for this district applied the ninety-day limit provided in sub-section (a)(2) of Rule 9027 to determine the timeliness of TRI's removal under 1452. The ninety-day period ended on August 5, 1992; accordingly, the bankruptcy court concluded that TRI's September 25 removal was not timely under §1452.[3]

Contesting this conclusion, TRI distinguishes claim removal from removal

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[3]Because it believed TRI's removal to be timely pursuant to 28 U.S.C. §§1331 & 1346, however, the bankruptcy court declined to remand the action.

of an entire cause of action, noting that §1452 allows a party to remove the entire lawsuit. Because ten of the removed claims (those added by Petrarca in its August 28, 1992 amended complaint) had not yet been filed when the ninety-day period provided by Rule 9027(a)(2) expired, TRI reasons, it was impossible for TRI to remove those claims within the ninety-day window. Rather, TRI implies, it had -- consistent with Rule 9027(a)(3) -- an additional thirty-days from receipt of the amended complaint in which to remove the new claims set forth therein.

The Bankruptcy Court for the Northern District of Texas, when considering whether an amendment to the plaintiff's pleadings operates to extend the removal period provided by



Rule 9027, turned to 28 U.S.C. §1446 for guidance, observing:

> Bankruptcy Rule 9027 substantially conforms to the language and procedure of 28 U.S.C. §1446. There is no case law to guide this Court on the effect of amended pleadings on the removal of cases under 28 U.S.C. §1478 [since repealed and replaced by 28 U.S.C. §1452] and Bankruptcy Rule 9027. This Court must rely on decisions concerning the removal of state court actions to United States district [sic] 28 U.S.C. §1446 for guidance since federal law controls.

In Re Shaffer, 42 B.R. 522, 525 (Bankr. N.D. Tex. 1994). Having conducted an extensive search, this court has found no authority offering a mere [sic] persuasive method of analysis than that employed in Shaffer. That court's

reliance on §1446 seems prudent and leads to a logical resolution of the problem before us.

As discussed previously, 28 U.S.C. §1446 allows for removal from state to district court: (1) within thirty days after service of the initial pleading setting forth the removable claim; or (2) "if the case stated by the initial pleading is not removable," within thirty days of receipt by defendant of information demonstrating that the matter has become removable. Thus, "[u]nless the amendment gives rise to another removable basis, a party will not acquire an additional thirty days in which he or she can remove his or her case." Shaffer, 42 B.R. at 525 (emphasis added).

Were it's true that Petrarca's amended complaint presented for the



first time removable claims, this Court might be persuaded that TRI had thirty more days in which to remove those claims. Under the circumstances presented, however, this court feels the bankruptcy court properly held that TRI failed to remove its case pursuant to §1452 in a timely fashion.

As previously observed, the ten claims added by Petrarca's amended complaint were predicted upon grounds identical to those underlying the two claims comprising the initial complaint. Accordingly, if -- as TRI alleges -- the added claims were removable because they were related to Child World's bankruptcy, so too were the original claims. Thus, the original cause of action was pending and removable within the purview of Rule 9027(a) when Child World filed for Chapter 11 protection on

May 6, 1992. TRI's opportunity to remove that cause (or any single claim therein) pursuant to §1452 and Rule 9027 arose on May 6 and expired ninety days thereafter. The "new" claims asserted in the amended complaint did not enable TRI to revive its lost removal option since they neither added nor substantially altered the basis for removal.

**II. Remaining Issues on Appeal**

Having determined that the notices of removal were filed untimely, and thus that the bankruptcy court lacked jurisdiction over this matter, this Court need not address the issues of abstention and waiver raised on appeal.



**CONCLUSION**

For the foregoing reasons, the Bankruptcy Court's order denying Plaintiff's motion to remand and granting Defendant's motion to transfer venue is reversed. The case is remanded to the Bankruptcy Court for further proceedings consistent with this order.

IT IS SO ORDERED.

/s/
SAM H. BELL
United States District Judge

APPENDIX D

No. 94-3980
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| ANTHONY A. PETRARCA, Plaintiff-Appellee, | ) | |
| v. | ) | ORDER |
| THINGS REMEMBERED, INC., Defendant-Appellant. | ) | |

Defendant filed a notice of appeal of the order of the district court remanding this action to the bankruptcy court for the purposes of remanding it to the state court from which it had been removed. The district court concluded that defendant's notices of removal pursuant to both 28 U.S.C. § 1441 and 28 U.S.C. § 1452 were untimely.



Consequently, the bankruptcy court lacked jurisdiction.

As a general rule, an order remanding an action to a state court from which it was removed is not reviewable on appeal or otherwise. 28 U.S.C. § § 1447(d) and 1452(b); *see State of Ohio v. Wright*, 992 F.2d 616 (6th. Cir. 1993) (en banc); *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341 (6th Cir. 1993); *Boone Coal and Timber Co. v. Polan*, 787 F.2d 1056, 1061 (6th Cir. 1986). It does not appear, therefore, that the order of the district court is an appealable order.

Defendant is hereby direct [sic] to show cause, within twenty-one days of the entry of this order, why this appeal should not be dismissed for lack of jurisdiction.

ENTERED PURSUANT TO RULE 8(b)
SIXTH CIRCUIT RULES

Leonard Green, Clerk

/s/_____

**CERTIFICATE OF SERVICE**

A true copy of the foregoing Petition for Certiorari was sent by regular U.S. Mail, postage prepaid on this 10th day of March, 1995 to:

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/s/_____
One of the Attorneys for
Appellant Things Remembered,
Inc.

In compliance with Rule 29.5. all parties required to be served have been served.